



UNITED STATES PATENT AND TRADEMARK OFFICE

UNITED STATES DEPARTMENT OF COMMERCE
United States Patent and Trademark Office
Address: COMMISSIONER FOR PATENTS
P.O. Box 1450
Alexandria, Virginia 22313-1450
www.uspto.gov

APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
09/800,153	03/05/2001	Gregory A. Sims	SIMSG 01-01.PA	4533

7590 06/23/2004

Jacox Meckstroth & Jenkins
Matthew J Jenkins
1205 Manatee Avenue West
Bradenton, FL 34205

EXAMINER

KIM, CHRISTOPHER S

ART UNIT	PAPER NUMBER
----------	--------------

3752

DATE MAILED: 06/23/2004

Please find below and/or attached an Office communication concerning this application or proceeding.



UNITED STATES PATENT AND TRADEMARK OFFICE

COMMISSIONER FOR PATENTS
UNITED STATES PATENT AND TRADEMARK OFFICE
P.O. Box 1450
ALEXANDRIA, VA 22313-1450
www.uspto.gov

MAILED

JUN 23 2004

GROUP 3700

**BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES**

Application Number: 09/800,153
Filing Date: March 05, 2001
Appellant(s): SIMS, GREGORY A.

Matthew R. Jenkins
For Appellant

EXAMINER'S ANSWER

This is in response to the appeal brief filed May 3, 2004.

Art Unit: 3752

(1) *Real Party in Interest*

A statement identifying the real party in interest is contained in the brief.

(2) *Related Appeals and Interferences*

A statement identifying the related appeals and interferences which will directly affect or be directly affected by or have a bearing on the decision in the pending appeal is contained in the brief.

(3) *Status of Claims*

The statement of the status of the claims contained in the brief is correct.

(4) *Status of Amendments After Final*

The appellant's statement of the status of amendments after final rejection contained in the brief is correct.

(5) *Summary of Invention*

The summary of invention contained in the brief is correct.

(6) *Issues*

Appellant's brief presents arguments relating to the non-entry of the after final amendment. Appellant's after final amendment attempted to correct the typographical error of the word "last" to "least" which would have been entered, but appellant attempted to further limit the claim by changing "wall" to "interior wall" which would have changed the scope of the claim requiring further consideration. The amendment was not entered in part. See MPEP § 714.20. Even so, the recitation, in claim 1, "at last one wall of the building" has been considered by the Examiner as to recite, "at least one

Art Unit: 3752

wall of the building." This issue relates to petitionable subject matter under 37 CFR 1.181 and not to appealable subject matter. See MPEP § 1002 and § 1201.

(7) Grouping of Claims

Appellant's brief includes a statement that claims 1-5 and 7-13 do not stand or fall together and provides reasons as set forth in 37 CFR 1.192(c)(7) and (c)(8).

(8) Claims Appealed

The copy of the appealed claims contained in the Appendix to the brief is correct.

(9) Prior Art of Record

2,246,731	Hill	6-1941
2,862,765	Wing	12-1958
4,800,672	Jackson	1-1989
4,917,296	Konieczynski	4-1990
5,310,114	Cann	5-1994

(10) Grounds of Rejection

The following ground(s) of rejection are applicable to the appealed claims:

Claims 1-5, 7, 8 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson (4,800,672) in view of Wing (2,862,765).

With respect to claims 1, 2 and 5-8,

Jackson discloses a system for distributing pesticide comprising: a port 63; a distribution manifold 57; a plurality of elongate tubing members 55, 52, 51; fluid discharge openings 53.

Art Unit: 3752

It should be noted that air is usually not considered an inert gas but the examiner is utilizing applicant's definition in the specification, on page 6, lines 23-24, wherein it recites "inert gas, such as compressed air (or nitrogen)."

Jackson discloses the limitations of the claimed invention with the exception of the details of the injection device. Wing discloses an injection device comprising: an inert gas inlet 18; a pesticide inlet 19; a valve means 33, 34. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided the injection device of Wing to the system of Jackson to utilize a non-explosive propellant (Wing, column 2, line 38).

With respect to claims 3 and 4, Jackson in view of Wing discloses the limitations of the claimed invention with the exception of the at least six outlets and at least eight outlets. Jackson schematically shows, in figure 4, two additional lines leading from selector valve 60. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided additional outlets to the device of Jackson in view of Wing for utilization in large buildings and/or provide additional distribution zones.

Claim 9 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson (4,800,672) in view of Wing (2,862,765) as applied to claim 1 above, and further in view of Hill (2,246,731).

Jackson in view of Wing discloses the limitations of the claimed invention with the exception of the wheeled vehicle. Hill discloses a wheeled vehicle (see figure 1). It would have been obvious to a person having ordinary skill in the art at the time of the

Art Unit: 3752

invention to have provided a wheeled vehicle to the device of Jackson in view of Wing as taught by Hill for mobility.

Claim 10 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson (4,800,672) in view of Wing (2,862,765) as applied to claim1 above, and further in view of Cann (5,310,114).

Jackson in view of Wing discloses a flow measuring means 54. Jackson does not disclose a recording means. Cann discloses a processor 28 having a video monitor or printer. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided a recording means to the device of Jackson in view of Wing as taught by Cann to provide a printout of flow characteristics.

Claim 11 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson (4,800,672) in view of Wing (2,862,765) and Cann (5,310,114) as applied to claim1 above, and further in view of Hill (2,246,731).

Jackson in view of Wing and Cann discloses the limitations the claimed invention with the exception of the wheeled vehicle. Hill discloses a wheeled vehicle (see figure 1). It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided a wheeled vehicle to the device of Jackson in view of Wing and Cann as taught by Hill for mobility.

Claim 12 stands rejected under 35 U.S.C. 103(a) as being unpatentable over Jackson (4,800,672) in view of Wing (2,862,765) as applied to claim1 above, and further in view of Konieczynski (4,917,296).

Art Unit: 3752

Jackson in view of Wing discloses a flow measuring means 54 (a pressure gauge) but it is not audible. Konieczynski discloses an audible alarm 56 connected to a pressure switch 54. It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided an audible signal means to the pressure gauge in the device of Jackson in view of Wing as taught by Konieczynski to provide an audible alarm.

(11) Response to Argument

Appellant argues that Jackson does not disclose a fluid injection device. In response to appellant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

Appellant argues that Wing does not use a port. First, Jackson discloses a port 63. Second, Wing discloses a port (the end opening of tube 40 which is coupled to housing 26 meets the limitation of a "port").

Appellant argues a feature of appellant's invention is covered in claim 1, "technician can inject a pesticide... selectively switch to a gas setting... The technician then removes the injection device and moves to the next port and repeats the procedure." Appellant argues that Jackson does not disclose such features. Appellant's argument is misplaced because Wing teaches such features. Wing discloses, in column 2, line 70, that valves 33 and 34 are normally closed. Wing discloses, in column 4, lines 39-57, selectively opening valve 33 to provide insecticide.

Art Unit: 3752

Wing then closes valve 33 and opens valve 34 to provide the propellant gas in container 15. Appellant's argument, "the technician then removes the injection device and moves to the next port and repeats the procedure," is not commensurate in scope with the claimed invention.

Appellant argues that there is no motivation to combine the teachings of Jackson and Wing and that the Examiner has failed to provide any showing or basis as to the motivation or teaching for combining the references. It appears that the appellant has not read the Final Office action. The Examiner has explicitly identified motivation provided within the reference of Wing. The rejection of claims 1-5, 7 and 8 in the Final Office action and repeated above clearly indicate:

It would have been obvious to a person having ordinary skill in the art at the time of the invention to have provided the injection device of Wing to the system of Jackson **to utilize a non-explosive propellant (Wing, column 2, line 38).**

Jackson discloses, in column 3, lines 2-5, that the fogging means receives fumigant under pressure. Wing discloses, in column 2, lines 36-40, a pressurized source of fumigant (everything upstream of cylinder 26 including the pressurized container 15) which utilizes "non-explosive propellant". It's common knowledge and common sense that a "non-explosive propellant" reduces or eliminates the risk of explosion resulting in a safer device for technicians to operate.

Appellant argues that Wing discloses a fixed tank inside the building for spraying pesticide outside the building. Wing does not limit nor require the physical placement of the containers 14 and 15. Wing discloses, in column 2, lines 22-25, "The tanks 14 and 15 may rest on the floor of the building or, if of small size, they may be hung on the wall

Art Unit: 3752

since the apparatus is not dangerous and the gas used is non-explosive." Appellant's claims do not require the injection device to be physically located outside the building. Even so, Jackson teaches, in column 2, lines 31-35, "...for transferring fumigant under pressure from a common reservoir, which can be placed outside of the building or in the garage into hollow cores of the wall."

Appellant argues that the valves 33 and 34 of Wing are not provided in an injection device. Claim 1 does not prohibit reading the valves 33 and 34 of Wing as part of Wings injections device.

Appellant argues that "Wing requires two valves 33 and 34, and neither of the Wing devices 33 and 34 comprises a gas inlet, a pesticide inlet and valve means for selectively providing gas and pesticide to the discharge portion of an injection device." The broadest reasonable reading of the claims and a reasonable application of Wing do not require such a limiting interpretation as suggest by the appellant. Wing discloses an injection device comprising: an inert gas inlet 18; a pesticide inlet 19; a valve means 33, 34 (i.e. everything upstream of cylinder 26).

Appellant argues that the references fail to teach of tubing members having spaced apertures and extending through at least one wall of the building. Appellant's argument directed to Wing is moot. Wing is not relied on for such teachings. Appellant argues that there are no openings in the tubing along the way to the foggers 53 in the device of Jackson. Again, appellant's argument is not commensurate in scope with the claimed invention. The claim 1 recites:

a plurality of elongated tubing members connected to the outlets, each tubing member extending through at l[e]ast one

Art Unit: 3752

wall of the building and having fluid discharge openings spaced along said tubing members.

Jackson discloses a plurality of elongated tubing members 55, 52, 51 connected to the outlets (outlets of distribution manifold 57), each tubing member 55, 52, 51 extending through at least one wall of the building and having fluid discharge openings 53 spaced along said tubing members 55, 52, 51. The discharge openings 53 are spaced along the tubing member 55, 52, 51 (especially in relation to the length of portion 52). Notice that the "plurality of" is met by 55A,B,C; 52A,B,C; 51A,B,C. In other words, Jackson shows, in figure 1, four elongated tubing members. The claim is not limited to one straight tube having multiple outlets along its length, as suggested by applicant. The claim reads "...and having fluid discharge openings spaced along said tubing members" The claim is not limited to a tube extending through at least one wall and having discharge openings along the tube.

Appellant argues that there is no motivation to combine the teachings of Hill with Jackson and Wing. Jackson teaches, in column 2, lines 32-35, "...reservoir, which can be placed outside of the building or in the garage..." Jackson is not particularly concerned with the placement nor permanence of the reservoir. Quite the contrary, Jackson's reservoir can be placed in multiple locations which suggests mobility and/or portability. Wing teaches, in column 2, lines 22-25, "...tanks 14 and 15 may rest on the floor of the building or, if of small size, they may be hung on the wall..." Wing too teaches the mobility and/or portability of the tanks 14 and 15. Hill teaches a fumigation distribution system having a distribution/tubing system having a port 21 tubing system 17, 20 and an injection device 50. The distribution system and injection device/

Art Unit: 3752

pressurized reservoir are all common to Jackson, Wing and Hill. Jackson and Wing suggest mobility and/or portability of the injection device/pressurized reservoir. Hill particularly teaches a wheeled vehicle (see figure 1). The reason and purpose of "wheels" speaks for itself; ease is mobility, to be able to roll when moved.

In response to appellant's argument that Cann is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Cann is reasonably pertinent to the particular problem with which the appellant was concerned. Appellant recites, on page 6 of his specification,

The computer 82 is also located on the truck. The computer obtains information from **flow meter 56 to record the quantity of pesticides actually provided to the building.** At the end of the service call, the technician can print out from the computer stored information including the date, time of day of the service call, **quantity of pesticide disbursed**, and the name of the technician. (Bold added)

Cann teaches, in column 3, lines 20-25, "...processor 28 receives the volume of paint flow data from feed flow meter 24... The paint usage data determined by the processor 28 can be displayed on an output device such as a video monitor or printer." Cann recites similar disclosure, in column 4, lines 44-51. Cann is concerned with the amount of fluid dispensed. Cann uses a flow meter and processor to determine the volume of paint dispensed. Cann's flow meter is not restricted to paint. Conceivably, a flow meter

which measures the flow of paint will also measure the flow of other fluids. Paints too vary in density and consistency.

Appellant argues that there is no motivation to combine the teachings of Cann with that of Jackson and Wing. Motivation can be found in Cann, column 1, lines 6-7. Wherein, Cann recites, "The subject invention relates to an apparatus and method for **measuring paint usage** in a painting system." (Bold added).

In response to applicant's argument that Konieczynski is nonanalogous art, it has been held that a prior art reference must either be in the field of applicant's endeavor or, if not, then be reasonably pertinent to the particular problem with which the applicant was concerned, in order to be relied upon as a basis for rejection of the claimed invention. See *In re Oetiker*, 977 F.2d 1443, 24 USPQ2d 1443 (Fed. Cir. 1992). In this case, Konieczynski is reasonably pertinent to the particular problem with which the applicant was concerned. Appellant's specification recites, on pages 10-11,

Whistles are placed in couplers and/or end caps of the distribution tubing, and make an audible sound when air is passed through the system. By attaching compressed air to the inlet port, the technician may go from room to room and listen, with the aid of a stethoscope, to ensure that pesticide will reach its desired destination. If a whistle is unable to be heard, then the line may be kinked or plugged, thus indicating that maintenance is necessary.

Appellant is utilizing an audible signal or lack thereof as a fault indicator. Konieczynski is utilizing a pressure sensor and an audible alarm to detect and indicate a fault/malfunction in the system, particularly, the deviation of fluid flow from the desired rate. See column 4, lines 10-15 and column 4, line 52 through column 5, line 17. Claim 12 recites "the tubing members also include audible signal means for producing an


Art Unit: 3752

audible signal when inert gas flows through the tubing members." Konieczynski discloses an audible signal means 56 for producing an audible signal when fluid flows (low flow as a result of clogging) through the tubing members. Wing teaches inert gas in container 15.

Appellant argues that there is no motivation to combine the teachings of Konieczynski with that of Jackson and Wing. Konieczynski provides the motivation in column 4, line 52 through column 5, line 17. Konieczynski teaches to sense and notify the operator of a malfunction using a pressure sensor and audible alarm.


For the above reasons, it is believed that the rejections should be sustained.

Respectfully submitted,


Christopher S. Kim
Primary Examiner
Art Unit 3752

CK 
June 18, 2004

Conferees

Michael Mar 

Steve Ganey 

Denise Pothier 

Quirk & Tratos
Suite 500 North
3773 Howard Hughes Parkway
Las Vegas, NV 89109